No. 92-1639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE CITY OF CHICAGO, *et al.*,
Petitioners,
v.
ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE OF BROWARD COUNTY, FLORIDA, CITY OF ALEXANDRIA, VIRGINIA, CITY OF AMES, IOWA, CITY OF HARRISBURG, PENNSYLVANIA, CITY OF INDIANAPOLIS, INDIANA, CITY OF TULSA, OKLAHOMA, COUNTY BOARD OF ARLINGTON, VIRGINIA, DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY RECOVERY SPECIAL SERVICE DISTRICT (UTAH), GREATER DETROIT RESOURCE RECOVERY AUTHORITY, JOINT BOARD OF OVERSIGHT FOR THE HAMPTON/NASA/USAF REFUSE-FIRED STEAM GENERATING FACILITY, METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MONTGOMERY COUNTY, OHIO, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NEW HANOVER COUNTY, NORTH CAROLINA, NORTHEAST SOLID WASTE COMMITTEE, RESOURCE AUTHORITY IN SUMNER COUNTY, TENNESSEE, SOLID WASTE AUTHORITY OF CENTRAL OHIO, SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA, ST. CROIX COUNTY, WISCONSIN, AND YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY IN SUPPORT OF PETITIONERS

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This brief *amici curiae* is submitted in support of the petition for a writ of certiorari filed by the City of Chicago, *et al.*, seeking review of the January 12, 1993 judgment entered by the United States Court of Appeals for the Seventh Circuit. That judgment, and the Seventh Circuit's related opinion, *Environmental Defense Fund, Inc. v. City of Chicago,* 985 F.2d 303 (7th Cir. 1993), were entered following this Court's November 16, 1992 order vacating the Seventh Circuit's previous judgment and remanding this case to the court of appeals. *Environmental Defense Fund, Inc. v. City of Chicago,* 948 F.2d 345 (7th Cir. 1991), *vacated,* 113 S. Ct. 486 (1992). The Seventh Circuit majority's opinion on remand, 985 F.2d at 304, readopts the majority's 1991 opinion, which concluded that ash residue from the operation of waste-to-energy, resource recovery facilities is subject to the hazardous waste management standards of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939 (1988) (the court of appeals' opinions are reproduced in the Appendix to the petition ("Pet. App.") at 1a-21a; Circuit Judge Ripple dissented in both instances). The Seventh Circuit's decision directly conflicts with the decision of the Second Circuit concerning the identical issue, *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.,* 931 F.2d 211 (2d Cir. 1991), *aff'g* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied,* 112 S. Ct. 453 (1991), and contradicts the plain meaning and clear legislative intent of section 3001(i) of RCRA, 42 U.S.C. § 6921(i), the principal statutory provision at issue. The Seventh Circuit's decision poses a serious obstacle to sound management of the growing municipal solid waste stream in the United States, and requires review by this Court. The parties' letters of consent concerning this brief have been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF *AMICI*

Amici vigorously supported the petition for a writ of certiorari that the City of Chicago filed in this matter in

1992 (Brief *Amici Curiae* of the City of Ames, Iowa, *et al.*, No. 91-1328). *Amici* do so again in 1993. *Amici*'s interest is directly linked to the current—and increasing—national concern regarding solid waste management. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action,* EPA/530-SW-89-019 (February 1989) (cited below as "*Agenda For Action*"). Simply stated, "we are generating more garbage all of the time, and we don't know what to do with it." *Id.* at 8. *Amici* include cities, counties, and local government agencies who have primary responsibility for managing this growing solid waste stream. Meeting that responsibility has required *amici* and their constituents to concern themselves with all of the public health, environmental and economic aspects of managing the municipal waste stream. That is the context in which *amici* have focused on the development of resource recovery facilities as a very important solid waste management tool.[1]

In some instances *amici* both own and operate resource recovery facilities. Other *amici* own resource recovery facilities that are operated by private vendors. Still others have entered long-term contracts with privately owned and operated resource recovery facilities. More specifically, *amici* include a number of cities and counties (Alexandria, Virginia; Ames, Iowa; Arlington, Virginia; Broward County, Florida; Harrisburg, Pennsylvania; Indianapolis, Indiana; Montgomery County, Ohio; Nashville, Tennessee; New Hanover County, North Carolina; St. Croix County, Wisconsin; and Tulsa, Oklahoma). Other *amici* are local government agencies and special authorities (Davis County Solid Waste Management and Energy Recovery Special Service District

[1] The term "municipal solid waste" (or "MSW") refers primarily to residential solid waste, with some contribution of solid (non-hazardous) waste from commercial, institutional and industrial sources. 40 C.F.R. § 241.101(k). A "resource recovery facility" produces energy (steam and electricity) from the combustion of MSW. *See* 42 U.S.C. § 6903(24).

(Utah); Greater Detroit Resource Recovery Authority; Joint Board of Oversight, Hampton/NASA/USAF Refuse-Fired Steam Generating Facility (Virginia); Resource Authority in Sumner County, Tennessee; Solid Waste Authority of Central Ohio; Southeastern Public Service Authority of Virginia; York County Solid Waste and Refuse Authority (Pennsylvania); and the Northeast Solid Waste Committee (North Andover, Massachusetts)).[2]

Amici also include national and regional organizations concerned with solid waste management. *Amicus* National Institute of Municipal Law Officers ("NIMLO") is a non-partisan organization representing more than 1,400 local governments and their attorneys. NIMLO is dedicated to sound resolution of nationally-important legal issues affecting municipalities, including waste management issues. Another of the *amici*, the Minnesota Resource Recovery Association, is an association consisting primarily of public entities working with the private sector in the development, ownership and operation of resource recovery facilities and other types of waste management facilities.[3]

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[2] The Southeastern Public Service Authority of Virginia consists of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southampton. The Northeast Solid Waste Committee is established under Massachusetts law as a corporate entity performing governmental functions concerning waste management on behalf of the following twenty-three Massachusetts communities: Acton, Andover, Arlington, Bedford, Belmont, Boxborough, Burlington, Carlisle, Dracut, Hamilton, Lexington, Lincoln, Manchester, North Andover, North Reading, Peabody, Tewksbury, Watertown, Wenham, Westford, West Newbury, Wilmington and Winchester.

[3] The Minnesota Resource Recovery Association represents waste-to-energy facilities serving the Minnesota counties of Anoka, Beltrami, Benton, Carver, Cass, Clay, Clearwater, Dodge, Douglas, Goodhue, Grant, Hennepin, Hubbard, Itasca, Mahnomen, Norman, Olmsted, Ottertail, Polk, Pope, Ramsey, Sherburne, Stearns, Stevens, Todd, Traverse, Wadena, Washington and Wilkin, and the Minnesota cities of Red Wing and Fergus Falls. Other members of the Association are: Winona and Dakota Counties, Northern States Power Company, United Power Association, Quadrant Company and Richards Asphalt.

Resource recovery facilities are key components of the integrated waste management systems that many local governments throughout the United States are pursuing (integrated waste management means the complementary use of several waste management methods—source reduction, reuse and recycling, waste combustion with energy recovery and landfilling—to handle waste in an environmentally sound and economical manner). *Agenda for Action* at 16. Resource recovery facilities use municipal solid waste as fuel to produce steam and electricity. These environmentally sound facilities also produce ash residue as a result of the combustion process, and manage the ash as nonhazardous waste consistent with the requirements of Subtitle D of RCRA, 42 U.S.C. §§ 6941-6949, and related state laws.

The implications of the court of appeals' decision that such ash is instead governed by RCRA's hazardous waste management standards are severe. The resource recovery facilities that *amici* represent produce thousands of tons of ash daily and are designed to operate 365 days a year. On a composite basis the 142 resource recovery facilities now operating in the United States produce approximately 8.5 million tons of ash annually. *See* Jonathan V.L. Kiser, *Municipal Waste Combustion in North America: 1992 Update*, Waste Age 26, 28 and 34, Figure 2 (November 1992) (cited below as *"Combustion in North America"*) (ash tonnage calculated based on data presented). Aside from the serious financial implications of managing this ash as hazardous waste, *amici* and the hundreds of communities they represent face troublesome enforcement consequences as well. The decision below undermines carefully designed solid waste management plans for *amici* and many other communities throughout the United

States that have turned to resource recovery as an environmentally sound strategy for municipal solid waste management.

REASONS FOR GRANTING THE WRIT

As the United States Environmental Protection Agency ("EPA") has noted, there is a "serious and growing solid waste problem in many American cities." *Agenda for Action* at 8. The volume of municipal solid waste in the United States continues to increase steadily. Indeed, for the most recent three-year period for which EPA survey data are available (1988-90), MSW increased by 9 percent—180 million tons to 195.7 million tons. U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update,* EPA/530-R-92-019, ES-3 (July 1992) (cited below as *"1992 Update"*); U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update,* EPA/530-SW-90-042, ES-3 (June 1990) (cited below as *"1990 Update"*). Moreover, EPA projects an increase to 222 million tons by the year 2000. *1992 Update* at ES-3.

Selecting the best strategy for managing this growing waste stream has changed over time and poses important policy questions for all levels of government. Although combustion of MSW had previously been widely used, combustion declined into the 1970's and early 1980's as old incinerators were closed down due to increasingly stringent air pollution control standards. *See 1992 Update* at 3-3/3-4. Landfilling of MSW became the primary management alternative, taking 80 percent or more of the municipal waste stream. *Agenda for Action* at 22-23. A serious shortage of landfill capacity and associated health and environmental concerns followed. *See 1992 Update* at 3-4.[4]

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[4] Congress warned in 1976 that "land is too valuable a national resource" to be devoted to disposal of most of our solid waste

A principal response to these matters has been the adoption of state and federal laws and policies encouraging development of waste-to-energy, resource recovery facilities (employing state-of-the-art air pollution control systems) as part of integrated solid waste management plans, *supra,* which also include source reduction, recycling, etc. Although more costly in the short run, waste combustion with energy recovery is favored over landfilling, the principal alternative. *See 1990 Update* at 4; *1992 Update* at 1-4; *see also* 54 Fed. Reg. 52209, 52245 (December 20, 1989) ("The EPA believes it is preferable to burn the combustible materials in an MWC [municipal waste combustor] [rather] than to landfill them. Not only is landfilling a disfavored waste management option (see RCRA section 1002(b)(8)), but it is sound policy to recover the energy value of the combustibles rather than burying them" [citations omitted]).[5] In adopting the Solid Waste Disposal Act Amendments of 1980, Congress expressly recognized the need to encourage the use of technology to produce usable energy from waste, which would reduce our reliance on diminishing fossil fuel resources and the burden of disposing of increasing volumes of MSW. 42 U.S.C. § 6941a.

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stream, and that "alternatives to existing methods of land disposal must be developed". 42 U.S.C. § 6901(b)(1) and (8).

[5] Combustion reduces waste volume or mass by approximately 90 percent. *See* Jonathan V.L. Kiser, *A Comprehensive Report on the Status of Municipal Waste Combustion,* Waste Age 109, 156 (November 1990). *See also* Michigan Department of Natural Resources, *Michigan Solid Waste Policy* 6 (1988) (although landfilling is still the least costly waste management option, it is also "the least desirable option because of the risk of groundwater contamination and the waste of some valuable materials"); Commonwealth of Massachusetts, Department of Environmental Protection, *Toward a System of Integrated Solid Waste Management/The Commonwealth Master Plan* 45 (June 1990) ("Preferable to landfilling for the management of most wastes, combustion offers more effective environmental control and monitoring systems with less potential for long-term, irreversible damage to the environment").

The result of these laws and policies has been a significant increase since 1985 in the development of resource recovery facilities by local government. But as a consequence of the court of appeals' decision, local government now confronts the specter of RCRA enforcement actions like the instant case and the overturning of solid waste management decisions made with painstaking care by *amici* and many other communities who face possible shutdown of resource recovery facilities and cancellation of new facilities.

1. Turning first to the immediate enforcement impact of the decision below, there are approximately 142 resource recovery facilities presently operating in the United States (and another 49 under construction or in various stages of planning). *See Combustion in North America,* at 28, 30 and Table 3. These facilities manage ash residue subject to RCRA Subtitle D and related state laws as nonhazardous waste; at no time have these facilities managed ash as hazardous waste pursuant to RCRA Subtitle C. Although the impact of the decision below would be most direct in the states that comprise the Seventh Circuit (if the Court does not grant the instant petition, resource recovery facilities in those states would have no choice but to begin managing resource recovery facility ash subject to Subtitle C requirements), the Seventh Circuit's decision poses serious uncertainty—and a Hobson's choice—for essentially all resource recovery facilities (outside the Second Circuit).

One option (in theory) would be to change the facilities' method of operation and begin managing ash residue subject to RCRA Subtitle C. That change in operations would carry a very steep price, however. As explained in more detail below, the cost of managing ash residue as hazardous waste could easily cause current waste management costs to double or triple, far outstripping the financial resources of the affected communities, and would also require dedicating limited hazardous waste landfill

capacity to disposal of benign resource recovery facility ash. *See infra* pp. 10-14 and note 12.

Another approach (for facilities outside the Seventh Circuit) would be to continue to manage ash as nonhazardous waste. But if the instant petition is not granted, there is serious concern that additional suits identical to the suit filed below in the Northern District of Illinois (and the related suit that was filed simultaneously in the Southern District of New York in the *Wheelabrator* case, *supra* p. 2) will be brought against *amici* and many other communities by respondents or similar organizations. Filed under RCRA's citizen suit provision, section 7002 of RCRA, 42 U.S.C. § 6972, these suits can impose injunctive relief and civil penalties of up to $25,000 per day of violation. *Id.; see also* 42 U.S.C. § 6928(g). The statute of limitations that generally applies in similar civil penalty actions is five years. *See* 28 U.S.C. § 2462; *see also Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73-76 (3d Cir. 1990), *cert. denied,* 111 S. Ct. 1018 (1991) (applying 28 U.S.C. § 2462 to citizen suits under section 505 of the Federal Water Pollution Control Act). A resource recovery facility produces ash every day that it operates, and it is apparent that failure to conform to the Seventh Circuit's interpretation exposes scores of communities to considerable enforcement risk and substantial civil penalty liability. Granting the petition will eliminate these troubling uncertainties.

2. Aside from these enforcement implications, the decision below will seriously undermine the carefully designed solid waste management plans of many communities and threaten the financial viability of most, if not all, resource recovery facilities due to the cost of managing resource recovery facility ash as hazardous waste. The economic burden that results from the court of appeals' interpretation of section 3001(i) cannot be reconciled with Congress' intent to encourage resource recovery facilities. That additional cost burden is, moreover, a

very troubling prospect for communities across the United States who already face serious fiscal problems.

a. As noted earlier, federal and state laws adopted in response to the growing solid waste dilemma vigorously encourage expanded use of resource recovery facilities and decreased reliance on landfilling of municipal solid waste. In that connection, section 32(a) of the Solid Waste Disposal Act Amendments of 1980, 42 U.S.C. § 6941a, recognizes that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste". The laws of a number of states are very similar. For example, section 32(f) of the Michigan Solid Waste Management Act, Mich. Comp. Laws § 299.432(4), prescribes a statewide "strategy to encourage resource recovery and establishment of waste-to-energy facilities" with the "goal of reducing land disposal to unusable residuals by the year 2005". Section 2(b) of the Tennessee Solid Waste Planning and Recovery Act, Tenn. Stat. Ann. § 68-31-602(b), provides that, among other things, "waste-to-energy incineration (resource recovery) will substantially lessen our dependence on landfills as a means of disposing of solid waste, aid in the conservation and recovery of valuable resources, [and] conserve energy in the process. . . ."[6]

Implemented through comprehensive solid waste management planning by local government, these policies have resulted in a significant increase in resource recovery facilities. Between 1985 and 1990 annual combustion

[6] *See also* Pa. Stat. Ann. title 35, § 6018.102(2) (encouraging the development of resource recovery facilities "as a means of managing solid waste, conserving resources, and supplying energy"); *Michigan Solid Waste Policy*, *supra* note 5 (establishes goal of managing 35 to 45 percent of the state's municipal waste through the use of resource recovery facilities and reducing the amount of MSW going to landfills to 10 percent by the year 2005).

of MSW with energy recovery increased from 7.6 to 29.7 million tons. *1992 Update* at 3-2, Table 24; *see also id.* at 3-3. The 1990 level is projected to increase more than 50 percent by the year 2000 and reach 46.2 million tons. *Id.* at 4-16 and 4-18, Table 34. An important source of electric energy, the federal government has projected a seven-fold increase between 1991 and 2010 in the amount of electricity generated in the United States from MSW combustion. *See* U.S. Dept. of Energy, *National Energy Strategy* 126 (1st ed. 1991/1992).

The court of appeals' decision is a severe setback—and a classic "Catch-22"—for *amici* and many other communities that followed Congress' lead and developed resource recovery facilities. These actions were taken with knowledge that resource recovery facilities were not only environmentally superior, but also generally more costly in the short run than landfilling MSW.[7] If the ash residue from a resource recovery facility must now be managed subject to hazardous waste standards, operating costs will increase dramatically. In this connection recent EPA data show that the cost of disposal in a hazardous waste landfill is ten times the cost of disposal at a nonhazardous waste (Subtitle D) landfill:

> Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately $453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately $42.00 per ton.

[7] The processing or "tipping" fees charged by modern resource recovery facilities are generally $40 to $100 per ton of municipal solid waste processed. Kiser, *supra* note 5, at 156. In contrast, the 1990 average landfill tipping fee in the United States was $26.56 per ton. National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6, Table 10 (1991).

Memorandum from William K. Reilly, Administrator, U.S. EPA, to All Regional Administrators, Subject: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i), at 7 (September 18, 1992), *reprinted in* Pet. App. 41a, 48a-49a. As a consequence of that more than tenfold increase in ash disposal costs, the tipping fees charged by individual resource recovery facilities could easily double or triple.[8]

Finally, these increases in MSW management costs need to be considered in context. Protection of public health and the environment is a primary concern of *amici* and a principal factor underlying development of resource recovery facilities by the communities *amici* represent. Nevertheless, the cost of complying with federal environmental mandates has become a serious concern for local government. *See* Ohio Municipal League, *Ohio Metropolitan Area Cost Report for Environmental Compliance* (September 15, 1992); Municipality of Anchorage, Alaska, *Paying for Federal Environmental Mandates: A Looming Crisis for Cities and Counties* (January 1993). Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, EPA has established the Local Government-Small Community Advisory Committee to address these financial concerns and related matters. *See* 57 Fed. Reg. 54393 (November 18, 1992). But as a consequence of the court of appeals' decision, many communities across the United States that are already grappling with serious fiscal problems now face an additional burden—a dramatic increase in waste management costs far beyond the level of cost anticipated when those communities chose

[8] MSW combustion ash amounts to approximately 25 percent (dry weight) of unprocessed MSW input. *1992 Update* at 3-3. Accordingly, the tipping fee for each ton of MSW processed would generally include the cost to dispose of 0.25 tons of ash (*i.e.*, 25 percent of $453 or approximately $113). With the increases in ash disposal cost noted above, a tipping fee currently in the range of $50 per ton of MSW processed (*see supra* note 7) would triple.

resource recovery facilities as an environmentally sound solid waste management strategy. The result could be to force many existing resource recovery facilities to shut down, and future development of new facilities would essentially be eliminated, contrary to RCRA's policy of encouraging resource recovery.[9]

b. One additional point should be noted in this regard. Hazardous waste landfill capacity is quite limited. It has been estimated that as of the end of 1987, the United States had 34 million tons of hazardous waste landfill capacity.[10] Only one hazardous waste landfill has been permitted since 1987 (in fact, only one hazardous waste landfill has been permitted during the past twelve years).[11] Moreover, since this case was initially before the Court, the number of hazardous waste landfills has declined by one, and there are now only 20 hazardous waste landfills in the United States. *See* William Gruber, *TSD Summary 1993*, EI Digest 14, 17 (January 1993).

[9] It is likely to be more economic for many communities to shut down their resource recovery facilities, landfill the communities' MSW, and pay the associated landfill tipping fees as well as the fixed costs on the dormant resource recovery facilities rather than operate the facilities and have to absorb the cost to manage ash residue as hazardous waste. *See supra* notes 7 and 8. Moreover, the potential liability associated with navigating the complex scheme of federal hazardous waste regulations would further discourage the use of resource recovery facilities, in direct contradiction of Congress' policy of encouraging these facilities.

[10] *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 198 (1989) (testimony of David L. Sokol, Chairman of the Institute of Resource Recovery). EPA has not published an estimate of hazardous waste landfill capacity in the United States.

[11] This is the Last Chance, Colorado hazardous waste landfill, which began operation in July, 1991. *See* Jeffrey D. Smith, *Hazardous Waste Landfill Facility Information*, EI Digest 24 (March 1992). Last Chance has 2.5 million tons of capacity. *Id.* at 26.

Given the difficulty of siting hazardous waste landfills, significant additional capacity is unlikely to become available soon. On the other hand, resource recovery facilities currently in operation produce approximately 8.5 million tons of ash each year. *See supra* p. 5. If as a result of the decision below that ash is required to be disposed in hazardous waste landfills, it can readily be seen that all of the United States' current hazardous waste landfill capacity could be consumed within a very short period.

3. Finally, the court of appeals' decision is wrong as a matter of statutory construction. This Court has often stated that in determining the meaning of a statute, courts should look to the particular statutory language at issue within the context of the statute as a whole, including its object and policy. *E.g., Crandon v. United States*, 494 U.S. 152, 158 (1990). The Seventh Circuit's narrow reliance on the absence of the word "generation" in section 3001(i) to conclude that resource recovery facility ash is subject to hazardous waste regulation ignores that fundamental tenet of statutory construction (section 3001(i) is reproduced in the Appendix to this brief).

a. When Congress adopted section 3001(i) as part of the 1984 amendments to RCRA, EPA's 1980 "household waste exclusion" unambiguously excluded from hazardous waste regulation the ash residue that remains following combustion of household waste. *City of Chicago*, 948 F.2d at 349 (EPA's 1980 preamble "most definitely exempted ash from regulation as a hazardous waste"). Adopted as part of EPA's regulations governing RCRA's hazardous waste management program, the household waste exclusion implemented congressional intent to exclude waste streams produced at the household level from hazardous waste management. *See* 45 Fed. Reg. 33084, 33099 (May 19, 1980) (quoting S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976) (RCRA's hazardous waste management program "is not to be used to control the disposal of substances used in households or to extend

control over general municipal wastes based on the presence of such substances")). EPA concluded that "[s]ince household waste is excluded in *all phases of its management*, residues remaining after treatment (*e.g.*, incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. at 33099 (emphasis added). Importantly, EPA emphasized that incinerator ash was not subject to hazardous waste regulation because the exclusion applies to "all phases of [the] management" of household waste, including ash residue after treatment, such as incineration.

Congress is presumed to know an agency's interpretation of a law pertinent to legislation Congress is enacting, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and when Congress enacted section 3001(i) in 1984 the regulatory status of MSW ash was clear: ash remaining after incineration of household waste was not subject to RCRA Subtitle C hazardous waste regulation because the household waste exclusion already encompassed "all phases" of the "management" of *household* waste. The focus of Congress' "clarification" in 1984 was whether EPA's 1980 regulation limiting the exclusion only to household waste—as opposed to including waste from non-household sources that contribute to the municipal waste stream (*e.g.*, small commercial and industrial establishments, schools, etc.)—was consistent with Congress' intent. As explained in the Senate Report that accompanied this legislation:

> Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. * * * *New section 3001[d] [sic] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of*

household waste and non-hazardous waste from other sources.

S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983) (emphasis added). Directly reflecting that intent, the statute provides that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" if the facility receives and burns only household waste and nonhazardous commercial or industrial solid wastes and establishes appropriate procedures to assure that hazardous wastes are not received at or burned at the facility. 42 U.S.C. § 6921(i).

In short, the plain language of the section 3001(i) "clarification" does nothing to terminate the prior exclusion for ash from resource recovery facilities that burn household waste. Instead, section 3001(i) "clarified" the preexisting household waste exclusion by providing that a resource recovery facility that burns household waste *and* nonhazardous waste from sources other than households (*e.g.*, commercial sources) will remain entitled to the exclusion if precautions are taken to ensure that the facility does not accept or burn hazardous waste.

The court of appeals' majority ignores this context and narrowly reads section 3001(i) as an evisceration of EPA's regulatory position by focusing on the absence of the word "generation" in section 3001(i). Nothing in the legislative history even remotely suggests that Congress, by not including the word "generation", intended the result reached by the court of appeals. To the contrary, since 1976 Congress has on numerous occasions expressed its intent to promote resource recovery facilities. *See, e.g.*, 42 U.S.C. § 6902(a)(1) (objectives of RCRA include promotion of resource recovery and resource conservation systems). In fact, the Senate Report accompanying section 3001(i) explicitly states that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284, *supra*, at 61.

Key legislative history confirms that section 3001(i) excludes resource recovery facility ash from hazardous waste regulation. The Senate Report, *supra*, accompanying the legislation describes the section 3001(i) exclusion as follows: "All waste *management* activities of such a facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion. . . ." S. Rep. No. 284, at 61 (emphasis added). Put another way, Congress unequivocally intended to exclude "all waste management" activities associated with resource recovery facilities from hazardous waste management standards. That is precisely what the statute says—activities that would constitute "otherwise managing hazardous wastes," which necessarily includes generation of hazardous waste, are excluded (the Conference Committee adopted the Senate's proposed clarification of the household waste exclusion without change; H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984)). When examined in this overall legislative context, the court of appeals' reliance on the absence of the word "generation" in section 3001(i) is plainly incorrect.[12]

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[12] The Seventh Circuit's decision may also result from a misconception regarding the nature of landfilled MSW and MSW combustion ash. The court of appeals said "[i]t is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills." 948 F.2d at 352. But contrary to the court of appeals' assumption, MSW combustion ash poses far less environmental concern than landfilling of MSW. *See supra* note 5; *see also* State of Florida, Division of Administrative Hearings, *Final Order Approving Certification*, Application for Power Plant Site Certification of Lee County Solid Waste Resource Recovery Facility (No. 90-3942EPP), at 3-4 (June 19, 1992) (adopting Recommended Order's finding of fact ¶ 7 (De-

b. Finally, when this case initially was before the Court, the Solicitor General argued that the language of section 3001(i) was unclear and, therefore, reviewing courts should defer to the reasonable interpretation of section 3001(i) set forth in the EPA Administrator's September 18, 1992 memorandum, *supra* pp. 11-12. Brief for the United States as Amicus Curiae, No. 91-1328, at 8, 12 (on petition for a writ of certiorari) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). On remand, the Seventh Circuit declined to defer to the EPA Administrator's interpretation on the grounds that the EPA Administrator's memorandum was yet another change in EPA's position on the issue. 985 F.2d at 304.

Amici continue to believe that the statutory language, taken as a whole, exempts resource recovery facility ash from hazardous waste regulation. Nevertheless, should this Court conclude that section 3001(i) is ambiguous, the Seventh Circuit's refusal to defer to the EPA Administrator's reasonable interpretation of section 3001(i) was wrong. *See, e.g.*, Chevron, 467 U.S. at 843-44. Revised agency interpretations deserve deference, *e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991), as agencies may

cember 9, 1991) that leachate from MSW combustion ash is far less of an environmental concern than the leachate from MSW). In fact, MSW combustion ash is now being beneficially reused in a variety of applications, including road construction and as a raw material in cement manufacturing. *See* Richard W. Goodwin, *Defending the Character of Ash*, Solid Waste & Power 18 (September/October 1992). The Seventh Circuit's above-quoted statement also appears to have been made without considering the record in this case—disposal of ash at a monofill (a sanitary landfill that receives only municipal incinerator ash) that is lined and equipped with ground water monitoring and leachate collection systems. Pet. at 7. Those disposal standards are generally required by Michigan law, Mich. Comp. Laws § 299.432a (the monofill is in Michigan) and typical of the laws of a number of other states. *See, e.g.*, Mass. Regs. Code title 310, § 19.119. *See also* 40 C.F.R. part 258 (adopting stringent federal criteria for municipal landfills and monofills receiving MSW combustion ash).

need to revisit such matters on a continuing basis. *See Chevron*, 467 U.S. at 863-64. Moreover, this is not a case where an agency has reversed an authoritative position on an issue of statutory interpretation.[13] Thus, even if this Court finds the language of section 3001(i) to be ambiguous, deference should be granted to the EPA Administrator's reasonable interpretation of the statute, namely, that resource recovery facility ash is not subject to hazardous waste regulation under RCRA.

In sum, the Seventh Circuit's interpretation of section 3001(i) jeopardizes the viability of existing resource recovery facilities and the development of new facilities, and encourages environmentally inferior alternatives (such as landfilling) for managing municipal solid waste, all of which is contrary to clearly expressed federal policy. To resolve the conflict in the Circuits and clarify this impor-

[13] While EPA's 1985 regulatory preamble suggests an interpretation of section 3001(i) that would not exempt MSW ash that "routinely exhibits" hazardous waste characteristics, the preamble concludes with EPA stating that "[it] does not believe the [1984 RCRA amendments—including section 3001(i)] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities." 50 Fed. Reg. 28702, 28726 (July 15, 1985). Importantly, that concluding statement is made after EPA restates its preexisting 1980 policy that MSW ash is not subject to regulation as hazardous waste. *Id.* at 28725. Subsequent statements by EPA officials only demonstrate the Agency's apparent struggle to resolve the confusion surrounding the 1985 preamble. *See Resource Conservation and Recovery Act—Oversight: Hearings Before the Subcomm. on Hazardous Wastes and Toxic Substances of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 427-428 (1987) (statement of J. Winston Porter, EPA Asst. Administrator, Office of Solid Waste and Emergency Response) (after reconsideration of its 1985 statements, EPA believes section 3001(i) was intended to exempt MSW ash); *Regulation of Municipal Solid Waste Incinerators, supra* note 10, at 33 (statement of Sylvia Lowrance, EPA Director, Office of Solid Waste) (EPA continues to follow its 1985 interpretation).

tant issue of federal environmental law, this Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

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APPENDIX

Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.